

1. **WU (Migration) [2017] AATA 2128 (27 October 2017)**

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Miss DAN WU
CASE NUMBER:	1715700
DIBP REFERENCE(S):	BCC2016/2455750
MEMBER:	Wendy Banfield
DATE:	27 October 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Statement made on 27 October 2017 at 3:27pm

CATCHWORDS

Migration – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – Bogus documents – School enrolment – School denies applicant's enrolment – Lack of independently verifiable information

LEGISLATION

Migration Act 1958, ss 5(1), 65

Migration Regulations 1994, Schedule 2, cl 500.217, Schedule 8, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Immigration on 4 July 2017 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s.65 of the *Migration Act 1958* (the Act).
6. The applicant applied for the visa on 24 July 2016. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.500.217 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because it was determined the applicant had given, or caused to be given bogus documents in support of her application for a student visa.
7. *Background*
8. The applicant is a citizen of China and is 23 years old. She came to Australia in April 2016 as the holder of Subclass 600 Visitor Visa that was valid until 26 July 2016. On 24 July 2016 the applicant applied for a Subclass 500 Student Visa to study in Australia. The applicant had declared on her visitor visa application form that she was then enrolled in a course of study in China at Shantou Vocational School of Traditional Chinese Medicine (Shantou School) and provided evidence in support. In her application for a student visa, the applicant made the same claim in response to a question about her education history. The claim was that she had been enrolled in medical studies at the Shantou School from 1 September 2014 to 31 January 2016. The supporting evidence was an enrolment certification from the school claiming the applicant was a student majoring in Healthcare.
9. The applicant appeared before the Tribunal on 6 October 2017 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
10. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
11. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.500.217 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and

- the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).
13. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

14. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
15. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
16. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
17. The Tribunal has considered the evidence as a whole when assessing whether a bogus document or information that is false or misleading in a material particular was given, and in deciding whether the requirements of cl.4020 should be waived. According to the Department's decision record dated 4 July 2017, on 24 July 2016 the applicant provided an English translation of a document in the form of an Enrolment Certificate from the Shantou School dated 16 December 2015. The document was provided in the course of her application for a student visa and to support the claim she had been enrolled as a student in China majoring in Healthcare.
18. In its reasons for refusing the grant of the visa, the Department state in the decision record that on 7 November 2016 a Departmental officer contacted the student section of the Shantou School to verify the applicant's enrolment. A representative of the school stated the applicant had never been a student of the school. The Department concluded the applicant had provided a bogus document in relation to her application for a student visa.
19. In her response to the Department's invitation to comment on adverse information, the applicant submitted further documents from the Shantou School with English translations. These consisted of a 'Study Certificate', payment receipts and a letter dated 30 November 2016 correcting the information given by a teacher at Shantou School to the Australian

Consulate in Guangzhou and declaring the applicant to be a student of the school. The applicant also provided a 'Student's Family Report Handbook', academic transcripts, Identity Certificate, a statutory declaration signed by the applicant and a Notarial Certificate. As the applicant did not provide any independently verifiable documents, the Department placed greater weight on the independent verification result obtained by the Departmental officer who contacted the Shantou School. The Department found the applicant had given or caused to be given, bogus documents with her application for a student visa.

20. At the hearing, the applicant gave evidence that she had been advised by the Shantou School that they had received three phone calls from authorities seeking to verify her enrolment status. The applicant claimed the school first received a call regarding her visitor visa granted in December 2015 and had confirmed she was a student. She said they received a second call in November 2016 but due to the amount of time since the applicant left, the teacher responding did not know who she was and would not have remembered all the students. It was claimed there had also been a third phone call in February 2017 in which the school had again confirmed the applicant had been a student.
21. The applicant made applications to the Department and the Tribunal for access to documents in this matter. The representative Adam Chen claimed in his written submission and at the hearing on behalf of the applicant that there were discrepancies in the Department's internal documents regarding dates. Mr Chen made reference to an email from Karen Liao of Guangzhou post that states contact was made with Shantou School on 21 September 2016 while the decision record of 4 July 2017 refers to a Departmental officer making contacting with the school on 7 November 2016.
22. The Tribunal considered the Department's internal correspondence referred to by Mr Chen, in particular his submission about emails authored by Karen Liao on 21 September 2016. The email states *"The applicant's visitor visa file was retrieved and further check [sic] was conducted regarding the document provided... Our office contacted the student section of the school and confirmed that the applicant has never been a student of the school."* This integrity check appears to have been carried out in relation to the visitor visa application and is likely to be the first call that was made. That this check was carried out in reference to the applicant's visitor visa is supported by Ms Liao's further statement in the email *"The applicant's immigration history (providing fraudulent education document in a visitor visa application)... are of concern."* The content of the email indicates that the Shantou School had confirmed the applicant had never been a student. Therefore, contrary to the applicant's claims, it appears the Shantou School had not confirmed she was a student the first time they were contacted.
23. Consistent with the Department's decision record, the applicant says the Shantou School told her they were contacted again in November 2016. The applicant acknowledges that at this time, the school had advised the Departmental officer she had never been a student, however, the applicant says this was only because it was some time since she left and the person who took the call would not have remembered her being a student. Mr Chen expressed concerns that this phone call was the one referred to in the Department's decision record of 4 July 2017. The Tribunal considers the reason for this is likely to be because the first phone call in September 2016 was in relation to the applicant's visitor visa while the Department's contact with the Shantou School in November related to her student visa. This is supported by the fact Ms Liao's email appears to be concerned with information sharing in regards to visitor visa and student visa details.
24. The applicant then obtained and submitted further information. A study certificate said to be from the Shantou School states the applicant suspended her studies in February 2016. A statement dated 30 November 2016 declares that a phone call from the Australian Consulate in Guangzhou was taken by an office teacher who had not checked before advising that the

applicant was not a student of the school. The Tribunal does not find the documents submitted after the Shantou School had advised the Department that the applicant was not a student to be credible and the independent verification originally obtained is preferred. The letter does not say that at any time prior to it being written, the school had in fact confirmed the applicant's enrolment by phone, as was claimed by the applicant. In addition, while the applicant provided documents that she claims relate to her studies such as some receipts and academic summaries, no details such as student number or identification, dates of enrolment, course or curriculum undertaken are referred to by the school in the letter of 30 November 2016. By contrast, it appears on the evidence that the Department made direct contact with the Shantou School on two occasions and was advised the applicant is not a student.

25. The applicant provided a Statutory Declaration dated 12 December 2016 in which she declares she was a full-time student of the Shantou School from 1 September 2014 to 31 January 2016 and a Certification dated 3 October 2017 by Shantou City Police Bureau that states the applicant had been a student of the Shantou School. Again the Tribunal prefers the independently verified evidence over self-reporting by the applicant in her statement. Regarding the Police Bureau Certificate, the Tribunal attempted to contact the officer concerned during the hearing as requested by the applicant but he was not available. Nevertheless, the Tribunal considers the Certificate has been made on the basis of information provided by the applicant, and the Tribunal is not satisfied this amounts to independent verification of her status at Shantou School.
26. Although the applicant claimed she had been told there were three phone calls made by Australian authorities to the Shantou School, the Tribunal does not have any independent evidence of a phone call in February 2017 in which the school confirmed the applicant's enrolment.
27. Mr Chen raised concerns about a statement on the Department's IMMI system when the applicant's submissions in relation to this matter were uploaded on 12 December 2016: *"this application has been finalized" "last updated on 8 December 2016"*. The Tribunal is unable to comment on the Department's internal processes, including what this notation may mean or what it refers to. However, it does not change the facts in this case and the Tribunal places no weight on it.
28. The Tribunal finds the applicant has given or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth a bogus document that purports to have been, but was not, issued in respect of the person, or is counterfeit or has been altered by a person who does not have authority to do so, or was obtained because of a false statement, whether or not made knowingly.
29. Therefore, the applicant does not meet cl.4020(1).

SHOULD THE REQUIREMENTS OF CL.4020(1) OR (2) BE WAIVED?

30. The requirements of cl.4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.
31. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v*

MIBP [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.

32. For the following reasons, the Tribunal is not satisfied that the requirements should be waived. The applicant did not submit evidence of any compelling or compassionate circumstances in accordance with the Migration Regulations. Having considered the evidence available, the Tribunal is not satisfied there are any such circumstances.
33. Therefore the requirements of cl.4020(1) should not be waived.
34. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.500.217.
35. There is no evidence the visa applicant meets the criteria for any other subclass within the class of visa sought.

DECISION

36. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Wendy Banfield
Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

MIGRATION ACT 1958

S.5 INTERPRETATION

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...